Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina	CC Docket No. 97-208

To: The Commission

BELLSOUTH'S REPLY IN SUPPORT OF MOTION TO STRIKE PORTIONS OF REPLY COMMENTS

In its Motion to Strike, BellSouth identified portions of opponents' reply filings that should be stricken because they introduced new, non-responsive evidence, Motion to Strike at 3-5, and/or advanced new, non-responsive arguments, id. at 6-8. This late-filed evidence and argument, BellSouth explained, violated the Commission's policy that "[t]he applicant's and third parties' reply comments may not raise new arguments or include new data that are not directly responsive to arguments that other participants have raised." Revised Procedures for Bell Operating Company Applications under Section 271 of the Communications Act, Public Notice, FCC 97-330, at 7 (rel. Sep. 19, 1997) ("Revised Procedures"). The opponents offer two defenses of their improper filings, both of which serve to highlight the need for firm Commission action to stop abuses in section 271 proceedings.

First, opponents suggest that even if withholding evidence and arguments might unfairly deprive BellSouth of an opportunity to respond in this proceeding, BellSouth nonetheless will have an opportunity to respond in CC Docket No. 97-231, regarding BellSouth's application for

interLATA relief in Louisiana. See WorldCom at 2-3; KMC Telecom at 2. The Commission, however, will rule upon BellSouth's Application based upon the record generated in this proceeding, not some other proceeding. Indeed, the Act expressly requires the Commission to conduct a separate proceeding for each state, 47 U.S.C. § 271(d)(3), and limits an appeal from a Commission proceeding to the record in that proceeding. 47 U.S.C. § 402(g) (applying Administrative Procedure Act to appeal from Commission section 271 decisions); 5 U.S.C. § 706 (review based upon record gathered by agency). BellSouth may not be denied a fair opportunity to respond in this proceeding simply because of the pendency of another matter.

Nor is BellSouth's limited opportunity to file ex parte submissions a cure-all. See Vanguard Cellular at 4. BellSouth is allowed only 20 pages of such filings, which the Commission has recognized is not a sufficient opportunity to address improper replies. See BellSouth Motion at 2.

Second, opponents argue that new evidence and arguments may be submitted during the reply round of a section 271 proceeding not only to rebut positions previously advanced by other parties, but also to shore up weak positions that were previously briefed. See WorldCom at 2; KMC Telecom at 2; Hyperion at 1-2; TCG at 2; Vanguard Cellular at 2-3; Intermedia at 2.

Most egregiously, Intermedia defends its reply comments as an effort to "expound on Intermedia's original assertions." Intermedia at 2. In so doing, Intermedia ignores the Commission's rule that a party may not use "replies merely [to] repeat arguments made by that party in . . . initial comments." Revised Procedures at 7. If it is improper just to repeat

arguments, then surely it also is improper to attempt to improve those same arguments in the retelling.[1]

Other parties state that the additional arguments and evidence included in their replies develop positions suggested by other parties. See WorldCom at 2; KMC Telecom at 2; Hyperion at 1-2; TCG at 2; Vanguard Cellular at 2-3. They suggest that so long as one of BellSouth's opponents touches on a broad subject in initial comments, all other opponents are free to withhold their arguments on that subject until the reply round, at which time they can "amplify the points with which the[y] agree[]." Vanguard Cellular at 3; see TCG at 2 (casting reply comments as "opportunity to record its agreement" with other parties' comments); WorldCom at 2 (using reply arguments for "elaboration of the point made in the comments of the Department of Justice").

This practice of augmenting other parties' comments violates the Commission's policies and objectives just as much as extending one's own initial comments. During the reply round, an applicant may "submit new factual evidence in its reply" only "if the sole purpose of that evidence is to rebut arguments made, or facts submitted by commenters." Revised Procedures at 7 (emphasis added). And, with respect to the timing and contents of replies, the Commission treats applicants and commenters equally. See id. (imposing restrictions on both "[t]he

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[1] Intermedia further argues that the Commission should sift through Intermedia's filing to find particular sentences, from pages of impermissible new evidence, that might genuinely be responsive. Intermedia at 3. It is not the job of this Commission (or BellSouth) to cull kernels of wheat from bushels of chaff. Moreover, BellSouth agrees with Intermedia that the Declaration of Julia Strow should be stricken, as BellSouth made clear in its motion. See BellSouth Motion at 3; Intermedia at 3. BellSouth in fact moved to strike every exhibit listed as part of Intermedia's reply. BellSouth Motion at 6 (identifying Appendices A through K of Intermedia's reply); see Intermedia Reply Comments at iv (listing exhibits A through K).

applicant's and third parties' reply comments"). Thus, just as an applicant may not submit new factual evidence or new substantive arguments in the reply round in order to expand upon points made by supporting commenters, so too are opposing commenters prohibited from using the reply round to bolster arguments they did not think to make in their initial filing, or were prevented by page limits from including. The fact that some other party raised an issue does not excuse either applicants or commenters from the duty of setting out, at the first opportunity, all the evidence and argument on which they intend to rely.

Indeed, the Commission's practice of giving all parties (rather than just the applicant) an opportunity to submit reply comments necessarily assumes that reply comments will be direct responses to prior filings — not extensions of them. Otherwise, opponents would have a strong incentive to hold their fire until the reply round, when the applicant would have no opportunity for rebuttal. In fact, if the Commission accepts extensions of other parties' comments as legitimate replies in this proceeding, it likely will see short "placeholders" in opponents' initial comments in the next section 271 proceeding, followed by far more argument and evidence on the same issues in other opponents' replies. The Commission should reject this tag-team pleading strategy and reaffirm that commenters may not include in their replies any evidence or arguments that are not designed directly to rebut arguments made during the first round of comments.[2]

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[2] The requirement of "directly responsive" reply filings should, moreover, require more than a mention of some other party's submission. Revised Procedures at 7. Thus, while the Telecommunications Resellers Association ("TRA") tries retroactively to make its reply comments responsive, TRA at 2-5, the Commission should hold that it was not enough for TRA merely to cite the comments of Ameritech and U S WEST to justify its new, free-standing arguments about UNE combinations. See TRA Reply Comments at 11-15.

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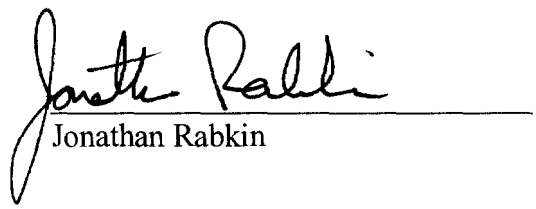
December 22, 1997

CERTIFICATE OF SERVICE

I, Jonathan Rabkin, hereby certify that on this 22nd day of December, 1997, I caused copies of BellSouth's Reply in Support of Motion to Strike Portions of Reply Comments to be served by first class mail upon the parties on the attached service list.



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